

**United States Department of Labor
Employees' Compensation Appeals Board**

F.M., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Fort Lauderdale, FL,
Employer**

**Docket No. 20-1274
Issued: September 28, 2021**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 17, 2020 appellant, through counsel, filed a timely appeal from a May 7, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 20, 2017, as she no longer had disability or residuals causally related to her accepted March 17, 2005 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after August 20, 2017, due to the accepted March 17, 2005 employment injury.

FACTUAL HISTORY

On March 20, 2005 appellant, then a 43-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that on March 17, 2005 she sustained injury to her back while standing and writing, and while lifting baggage in the performance of duty. She stopped work on March 20, 2005. OWCP accepted appellant's claim for lumbar strain, displaced lumbar disc at L1-L2, L5-S1, degeneration of lumbosacral disc L1-L2 and L5-S1, and lumbosacral radiculitis. It paid her wage-loss compensation on the supplemental rolls beginning June 4, 2013 and on the periodic rolls as of March 9, 2014.

In a November 19, 2016 report, Dr. Alicia Chilito, a Board-certified family practitioner, noted that appellant had lumbar herniated discs, which originally occurred during an injury in 2005. She indicated that appellant had undergone several procedures including implantation of an electronic pain stimulator to no avail. Dr. Chilito advised that appellant continued to receive treatment with a goal of enabling appellant to perform her activities of daily living, without being dependent on opiate-type medications. She opined that appellant was totally and permanently disabled from performing any gainful occupation.

On December 13, 2016 OWCP referred appellant to Dr. Clinton G. Bush, III, a Board-certified orthopedic surgeon, for a second opinion examination to determine the status of appellant's accepted conditions and the extent of her disability.

In December 30, 2016 report, Dr. Bush noted appellant's history of injury and medical treatment, and his review of the statement of accepted facts (SOAF). He examined appellant and provided findings, which included full range of motion of the cervical spine, thoracolumbar spine, and extremities, no muscle atrophy, and no neurological deficits. Dr. Bush diagnosed degenerative disc disease of the lumbosacral spine and upper lumbar strain, resolved. He advised that there was no evidence of a traumatic event, which would correlate with a lumbosacral disc injury. Dr. Bush related that appellant indicated that she "was moving pieces of luggage" "but had no symptoms whatsoever until she lifted an extremely light weight object -- a piece of paper -- and felt a sudden twinge in her back in the region of the thoracolumbar junction, and this was without any associated

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the May 7, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

radicular symptomatology. Nine days later, she had a magnetic resonance imaging scan (MRI) scan, which showed evidence of disc herniation at two levels as well as a minor disc bulging at L5/S1.” Dr. Bush explained that disc bulging and disc desiccation were signs of degenerative disease, which would be expected in a 45-year-old. He noted that sensation of pain at the thoracolumbar junction did not correlate with a disc abnormality at L5-S1 and that disc desiccation was not a sign of trauma, but was instead a pathognomonic sign of disc degeneration. Dr. Bush also noted that appellant’s symptoms were not causally related simply because she had the complaints when she left work on March 17, 2005, but claimed not to have had any such complaints prior to arriving at work. He opined that “[i]n view of [appellant’s] own description of her activities at work on that date, I find no reasonable or logical causal connection, and *post hoc* arguments propounded by [appellant’s] pain doctor are simply not compelling.” Dr. Bush also opined that the initial diagnosis of lumbar strain was correct, and had resolved. He further opined that the accepted diagnosis of degenerative disc disease of the lumbosacral spine was correct. Dr. Bush indicated that, within a reasonable degree of medical certainty, there was no credible evidence of a disc injury at either L1-L2 or at L5-S1. He further advised that, with reasonable medical certainty, any current evidence of lumbosacral radiculopathy would be due to the progression of the degenerative disc disease. Dr. Bush noted that appellant’s complaints were subjective and there was very little in the way of objective findings. He explained that the September 17, 2013 electrodiagnostic studies suggested possible mild right L5 radiculopathy, but this did not correlate with appellant’s subjective symptoms, which would correlate best with an L3 dermatome distribution. Dr. Bush advised that appellant was restricted from the full physical requirements of her job, especially the 70-pound lifting requirement, but he opined that this restriction was not causally related to the March 17, 2005 injury. He advised that appellant had chronic pain issues, which were not related to her employment activities and that she had reached maximum medical improvement (MMI). Dr. Bush completed a work capacity evaluation (Form OWCP-5c) and noted that appellant could return to work with restrictions.

On July 12, 2017 OWCP advised appellant of its proposed termination of her wage-loss compensation and medical benefits based on Dr. Bush’s report that she had no further employment-related residuals or disability due to her March 17, 2005 employment injury. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

OWCP received a February 21, 2017 report from Dr. James Caviness, Board-certified in occupational medicine, who reviewed the report from Dr. Bush as a medical review physician for the employing establishment’s workers’ compensation case management program. Dr. Caviness advised that Dr. Bush was thorough and offered clear and compelling medical evidence that appellant had subjective complaints far in excess of any objective findings and there was no residual impairment related to the work injury. He found that appellant was at MMI and was capable of work, although not at her preinjury level.

In a July 26, 2017 report, Dr. Christopher G. Vendryes, a pain management specialist, noted that appellant was suffering from a chronic painful condition, post work-related injury on March 17, 2005. He disagreed with Dr. Bush and explained that incidents leading to herniation “need not be a severe traumatic injury it is well documented sneezing can cause herniation of the lumbar sacral disc. Lifting suitcases which is part of [appellant’s] job especially on a repetitive basis has been known to cause herniation. Surely [appellant] did not claim lifting a piece of paper caused her herniation.” Dr. Vendryes also explained that disc herniation was “indeed a sign and may be part and parcel of degenerative disc disease but disc bulging however can and has been

seen to occur separately from disc degeneration. It can also be argued that her job[-] related injury caused the disc bulges superimposed on her degenerative disc disease.” Dr. Vendryes further related that the size of the disc bulge/herniation did not necessarily correlate with pain or the intensity, “The herniation/bulge may be small but in the right location so as to impact on the nerve root, it will cause radicular symptoms.” He indicated that he believed that Dr. Bush had also seen on MRI scans large herniation in the face of minimal or no radicular pain, likewise a very clean MRI scan in patients with radicular pains. Dr. Vendryes opined that appellant’s lumbar condition culminated in her present state and that there was a causal relationship to the initial work injury.

In a letter dated August 7, 2017, counsel argued that Dr. Bush did not accept that the findings in OWCP’s SOAF, including that appellant had a traumatic injury and that the accepted conditions included displacement of the lumbar intervertebral disc, as well degeneration of the lumbosacral disc at L1-2, and L5-S1.

By decision dated August 17, 2017, OWCP terminated appellant’s wage-loss compensation and medical benefits, effective August 20, 2017. It found that the weight of the medical evidence rested with the opinion of Dr. Bush, the second opinion physician, and established that appellant had no further disability or residuals due to her accepted employment injury.

In an August 7, 2017 report, Dr. Vendryes examined appellant and diagnosed degeneration of the lumbar or lumbosacral intervertebral disc, spondylosis lumbar spine, thoracic or lumbosacral neuritis or radiculitis, unspecified, and sacroiliitis. In a November 30, 2017 report, he disagreed with the termination of appellant’s compensation benefits. Dr. Vendryes repeated his explanation from his July 26, 2017 report that incidents leading to herniation need not be severe. He noted that the MRI scan report of March 26, 2005, eight days after the work injury, revealed displaced bulging disc at L5-S1, the MRI scan report of October 2, 2006 revealed posterolisthesis of L5-S1 with displaced bulging disc, and an MRI scan report of June 5, 2012 included an L5-S1 disc bulging eccentric to the left with facet arthrosis. Dr. Vendryes repeated his opinion that appellant’s lumbar condition culminated in her present state and there was a causal relationship to the initial work injury. He opined that it was surprising that Dr. Bush could categorically state that none of appellant’s current/ongoing symptoms were related to the accepted injury.

On August 25, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review, which was held on February 13, 2018.

By decision dated May 14, 2018,⁴ the OWCP hearing representative affirmed OWCP’s termination of appellant’s wage-loss compensation and medical benefits, effective August 20, 2017. However, the hearing representative found that a conflict in medical opinion evidence was created with regard to whether appellant had continuing disability on or after August 20, 2017, as Dr. Vendryes had provided a November 30, 2017 rationalized opinion disagreeing with Dr. Bush’s opinion.

On July 17, 2018 OWCP determined that a conflict in evidence arose regarding whether appellant had continuing disability and residuals from the accepted employment injury. OWCP

⁴ The May 14, 2018 decision superseded an April 27, 2018 decision in which the OWCP hearing representative determined that the August 17, 2017 decision was affirmed in part and remanded it part.

referred appellant to Dr. Alan Crystal, a Board-certified orthopedic surgeon, to serve as an impartial medical examiner (IME).

In an August 13, 2018 report, Dr. Crystal noted appellant's history of injury and medical treatment, and the SOAF. He examined appellant and noted that he found no objective clinical findings. Dr. Crystal explained that appellant claimed decreased sensation, but this was negated by her claim of decreased vibratory sensation. He noted that her motor examination was normal and she had normal reflexes without any atrophy. Dr. Crystal explained that appellant did not have any residuals of disc degeneration because she did not have any objective clinical findings that would correlate with nerve root impingement. He advised that "disc degeneration is a degenerative process, not a traumatic process. It is my opinion that the 'degeneration of lumbar or lumbosacral intervertebral disc' is not related to the work injury and has resolved." Dr. Crystal explained that "[o]nce a disc begins its degeneration, discs can displace with little or no pressure on them. It is speculative that '[d]isplacement of lumbar intervertebral disc' causes back pain, unless a discectomy is performed and the procedure resolved the back pain." Dr. Crystal noted that appellant had generalized spine degeneration which was a competent source of back pain and that it was "extremely difficult to identify the exact spine structure which is causing a patient's back pain. That is why spine procedures often fail to alleviate pain. Hence the accepted condition has resolved." He opined that appellant did not have any residuals of the accepted conditions of sciatica and sprain of the back lumbar region, because she did not have any objective clinical findings and the accepted conditions had resolved.

By decision dated October 29, 2018, OWCP again found that appellant had not established continuing disability or residuals on or after August 20, 2017. It found that the opinion of Dr. Crystal, the IME, represented the special weight of the evidence.

On November 5, 2018, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 11, 2019.

By decision dated May 28, 2019, the hearing representative set aside the October 29, 2018 decision, finding that Dr. Crystal's report was insufficiently rationalized. The hearing representative remanded the case for a supplemental report.

In a letter dated June 18, 2019, requested that Dr. Crystal provide clarification regarding whether appellant continued to have disability or residuals on or after August 20, 2017, causally related to her accepted conditions. OWCP also requested that Dr. Crystal review the report of Dr. Vendryes and discuss his findings.

In an addendum report dated July 22, 2019, Dr. Crystal explained that he had reviewed the medical evidence and opined that appellant was "not suffering from the accepted conditions of degeneration of lumbar or lumbosacral disc." He explained that the MRI scan performed nine days after the March 17, 2005 employment injury did not show any lumbar degeneration. Dr. Crystal noted that the MRI from October 2, 2006 showed lumbar degeneration; however, this was not due to injury, but rather, was secondary to progressive disc degeneration. He further noted that for almost four months after the date of the injury there were no objective findings. Dr. Crystal advised that a discogram could have been performed to prove that the disc degeneration was the source of appellant's back pain, however, it was not performed and the etiology of her back pain was only surmised and not conclusive. He opined that it was improbable that radiculopathy could occur with a clean MRI.

By *de novo* decision dated October 21, 2019, OWCP found that appellant had not established continuing disability or residuals on or after August 20, 2017, based on Dr. Crystal's opinion.

On October 31, 2019, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings & Review, which was held on February 28, 2020.

By decision dated May 7, 2020, the hearing representative affirmed the October 21, 2019 decision, finding that Dr. Crystal resolved the conflict between the opinions of Dr. Bush, the second opinion physician, and Dr. Vendryes, appellant's treating physician and, therefore, constituted the special weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 20, 2017.

OWCP accepted appellant's claim for lumbar strain, displaced lumbar disc at L1-L2, L5-S1, degeneration of lumbosacral disc L2-L2 and L5-S1, and lumbosacral radiculitis. It referred appellant to Dr. Bush for a second opinion evaluation to determine whether appellant's accepted

⁵ *D.G.*, Docket No. 20-1037 (issued December 15, 2020); *R.H.*, Docket No. 19-1604 (issued October 9, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ *E.K.*, Docket No. 18-0835 (issued September 23, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018); *Del K. Rykert*, 40 ECAB 294-96 (1988).

⁸ *M.P.*, Docket No. 20-0024 (issued September 1, 2020); *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁹ *D.B.*, Docket No. 19-0663 (issued August 27, 2020); *R.P.*, Docket No. 18-0900 (issued February 5, 2019); *Calvin S. Mays*, 39 ECAB 993 (1988).

conditions had resolved. OWCP provided Dr. Bush a SOAF which accurately reflected the accepted conditions in this case.¹⁰

OWCP's procedures dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹¹

In his December 30, 2016 report, Dr. Bush explained that disc bulging and disc desiccation were signs of degenerative disease which would be expected in a 45-year-old and were most certainly not a sign of trauma but is instead a pathognomonic sign of disc degeneration. He also opined that appellant's initial diagnosis of lumbar strain was correct, and had resolved. Dr. Bush further opined that the accepted diagnosis of degenerative disc disease of the lumbosacral spine was correct. However, he concluded that there was no credible evidence of a disc injury at either L1-L2 or at L5-S1. In so far as Dr. Bush concluded that appellant had no credible evidence of a disc injury at L1-L2 and L5-S1 caused by the accepted traumatic injury, his opinion was not based upon the SOAF and is therefore of no probative value.¹²

As the report from Dr. Bush is of no probative value, OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 20, 2017.¹³

¹⁰ *J.N.*, Docket No. 19-0215 (issued July 15, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *G.B.*, Docket No. 16-0996 (issued September 14, 2016).

¹² *Id.*

¹³ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 28, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board